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No. 03-95

# In the Supreme Court of the United States

PENNSYLVANIA STATE POLICE, PETITIONER

*v.*

NANCY DREW SUDERS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether an employer may assert the affirmative defense to vicarious liability recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), when a plaintiff-employee shows that a hostile work environment created by a supervisor culminated in a constructive discharge.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Statement | 2 |
| Summary of argument | 7 |
| Argument: | |
| An employer is strictly liable for a constructive discharge when the constructive discharge results from a supervisor's official act | 10 |
| A. To establish a constructive discharge, an employee must show that a reasonable employee would have felt compelled to resign | 12 |
| B. The employee's burden of showing a constructive discharge and an employer's proof of the elements of the *Ellerth/Faragher* affirmative defense substantially overlap | 14 |
| C. *Ellerth* guides the resolution of the question presented | 18 |
| D. Under *Ellerth*, a constructive discharge triggers strict liabilty when it results from a supervisor's official act | 21 |
| E. The case should be reversed and remended for a determination whether respondent's supervisors committed an official act | 28 |
| Conclusion | 29 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Bergene* v. *Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136 (9th Cir. 2001) | 13 |
| *Bourque* v. *Powell Elec. Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980) | 13 |
| *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742 (1998) | *passim* |

Cases—Continued: Page

*Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000) ..... 11, 26
*Drake* v. *Minnesota Mining & Mfg. Co.*, 134 F.3d 878 (7th Cir. 1998) ..... 13
*Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998) ..... 1, 5, 6, 7, 10, 11, 25
*Fitz* v. *Pugmire Lincoln-Mercury, Inc.*, 348 F.3d 974 (11th Cir. 2003) ..... 13
*Ford* v. *General Motors Corp.*, 305 F.3d 545 (6th Cir. 2002) ..... 13
*Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885 (3d Cir. 1984) ..... 13
*Jackson* v. *Arkansas Dep't of Educ.*, 272 F.3d 1020 (8th Cir. 2001), cert. denied, 536 U.S. 908 (2002) ..... 15
*Jaros* v. *Lodgenet Entm't Corp.*, 294 F.3d 960 (8th Cir. 2002) ..... 11, 13, 15
*Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999) ..... 26
*Landrau-Romero* v. *Banco Popular De Puerto Rico*, 212 F.3d 607 (1st Cir. 2000) ..... 13
*Lindale* v. *Tokheim Corp.*, 145 F.3d 953 (7th Cir. 1998) ..... 15
*Lopez* v. *S.B. Thomas, Inc.*, 831 F.2d 1184 (2d Cir. 1987) ..... 13
*Matvia* v. *Bald Head Island Mgmt., Inc.*, 259 F.3d 261 (4th Cir. 2001) ..... 13
*Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986) ..... 18
*Mungin* v. *Katten Muchin & Zavis*, 116 F.3d 1549 (D.C. Cir. 1997) ..... 13
*Reed* v. *MBNA Mktg. Sys., Inc.*, 333 F.3d 27 (1st Cir. 2003) ..... 11, 27, 28
*Robinson* v. *Sappington*, 351 F.3d 317 (7th Cir. 2003) ..... 11, 27



Cases—Continued: Page

*Sanchez* v. *Denver Pub. Sch.*, 164 F.3d 527 (10th Cir. 1998) ..... 13
*Tidwell* v. *Meyer's Bakeries, Inc.*, 93 F.3d 490 (8th Cir. 1996) ..... 14
*United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962) ..... 2
*Whidbee* v. *Garzarelli Food Specialities, Inc.*, 223 F.3d 62 (2d Cir. 2000) ..... 13
*Young* v. *Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975) ..... 13

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* ..... 4
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... 1, 2, 4, 8, 12, 18, 20, 24
42 U.S.C. 2000e(b) ..... 18
42 U.S.C. 2000e-2(a)(1) ..... 12
42 U.S.C. 2000e-5(f)(1) ..... 1
Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951 *et seq.* (West 2000) ..... 4

Miscellaneous:

1 Barbara Linderman & Paul Grossman, *Employment Discrimination Law* (3d ed. 1997) ..... 14
EEOC, *No. N-915-050, Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990) <http://www.eeoc.gov/policy/docs/currentissues.html> ..... 13, 15
Restatement (Second) of Agency (1957) ..... 18

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## INTEREST OF THE UNITED STATES

The question presented in this case is whether an employer may assert the affirmative defense recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), when the plaintiff in a Title VII action shows that a hostile work environment created by a supervisor culminated in a constructive discharge. The United States has a substantial interest in the resolution of that question, and participated as an amicus in both *Ellerth* and *Faragher*. The Attorney General is responsible for enforcing Title VII with respect to public employers. 42 U.S.C. 2000e-5(f)(1). The Equal Employment Opportunity Commission (EEOC) has authority to enforce Title VII with respect to private employers. And, as an employer, the United States has

an interest in ensuring the fair and balanced enforcement of Title VII. The United States takes the position that the affirmative defense recognized in *Ellerth* and *Faragher* is available in a case alleging a constructive discharge, unless the constructive discharge was triggered in significant part by an "official act" of the employer.

## STATEMENT

Respondent Nancy Suders filed suit against petitioner Pennsylvania State Police alleging, *inter alia*, that she had been subjected to sexual harassment and constructively discharged, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The district court granted petitioner's motion for summary judgment, but the court of appeals reversed. Because the case was resolved on petitioner's motion for summary judgment, the record must be viewed in the light most favorable to respondent. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). When viewed in that light, the summary judgment record establishes the following:

1. In March 1998, petitioner hired respondent as a police communications officer for the McConnellsburg barracks. Pet. App. 5a-6a. Respondent's supervisors were Sergeant Eric Easton, Station Commander at the McConnellsburg barracks, Patrol Corporal William Baker, and Corporal Eric Prendergast. *Id.* at 6a. Those three supervisors subjected respondent to a continuous pattern of sexual harassment that ceased only when she resigned from the force. *Ibid.*

Every time respondent went into Sergeant Easton's office, "he would bring up [the subject of] people having sex with animals." Pet. App. 6a-7a. Easton also stated, in respondent's presence, that "if someone had a



daughter, they should teach her how to give a good blow job[.]" *Id.* at 7a. And Easton would sit down in a chair near respondent, wearing spandex shorts, and spread his legs apart. *Ibid.* Corporal Baker repeatedly made obscene gestures in respondent's presence. *Id.* at 8a. He would "cross his hands, grab hold of his private parts and yell, suck it." *Ibid.* He would also rub his rear end in front of respondent and say "I have a nice ass, don't I?" *Id.* at 9a. Corporal Prendergast told respondent that "the village idiot could do her job." *Ibid.* He would wear black gloves and pound on the table to intimidate her. *Ibid.*

In June 1998, Prendergast accused respondent of taking a missing accident report home with her. Pet. App. 10a. After that incident, respondent approached petitioner's Equal Employment Opportunity Officer, Virginia Smith-Elliot, and told her she might need help, but neither respondent nor Smith-Elliot followed up on the matter. *Ibid.* On August 18, 1998, respondent contacted Smith-Elliot again, telling her that she was being harassed and was afraid. *Id.* at 11a. Smith-Elliot told respondent to file a complaint, without telling respondent where to obtain the form, and respondent perceived Smith-Elliot's manner as insensitive and unhelpful. *Ibid.*

Two days later, respondent's supervisors arrested her for theft, and respondent resigned from the force. Pet. App. 11a-12a. The background to that incident is as follows: Pursuant to a job requirement, respondent had taken on several occasions an exam testing her computer skills. *Id.* at 11a. Each time, respondent's supervisors told her that she had failed. *Ibid.* When respondent discovered her exams in a set of drawers in the women's locker room, she concluded that her supervisors had never sent them out to be graded and

that they had lied to her about having failed the exams. *Ibid.* Respondent's supervisors ultimately discovered that the exams were missing, and that prompted them to devise a scheme to arrest respondent for stealing the exams. *Id.* at 11a-12a. The officers dusted the drawers where the exams had been stored with a theft detection powder that turns a person's hands blue when the powder is touched. *Id.* at 12a. When respondent returned the papers to the locker room drawers where she had found them, her hands turned blue. *Ibid.* Respondent's supervisors then apprehended her, handcuffed her, photographed her, and questioned her. *Ibid.*

Respondent had previously prepared a written resignation. Pet. App. 12a. After respondent's supervisors detained her, she gave them her letter of resignation and attempted to leave. *Ibid.* The officers initially refused to permit her to leave and instead brought her to an interrogation room where she was given *Miranda* warnings and questioned further. *Ibid.* When respondent again voiced her intent to resign, she was permitted to leave. *Ibid.*

2. Respondent filed suit against petitioner alleging, *inter alia*, that she had been subjected to sexual harassment and constructively discharged, in violation of Title VII. Pet. App. 12a-13a. The district court granted petitioner's motion for summary judgment. *Id.* at 62a-82a.[1]

[1] Respondent also alleged that petitioner subjected her to discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951 *et seq.* (West 2000). Pet. App. 12a-13a. The district court dismissed those claims on sovereign immunity grounds, *id.* at 72a-74a, and those claims are not at issue here. The district court also dismissed respondent's claims against her three supervisors and Smith-Elliot, *id.* at 70a-72a, and those claims are not at issue here.



The district court held that respondent had presented sufficient evidence to permit a trier of fact to find that respondent's supervisors had created an actionable hostile work environment. Pet. App. 74a-77a. The court ruled, however, that petitioner was not vicariously liable for that harassment. The court noted that, under *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), in the absence of a tangible employment action, an employer may assert as a defense to a sexual harassment claim that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Pet. App. 77a (quoting *Faragher*, 524 U.S. at 807-808). The district court concluded that petitioner had established that defense as a matter of law. *Id.* at 78a-80a. The district court did not address respondent's constructive discharge claim.

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-61a. Like the district court, the court of appeals concluded that respondent had presented sufficient evidence to permit a reasonable trier of fact to conclude that respondent's supervisors had engaged in "a pattern of sexual harassment that was pervasive and regular." *Id.* at 19a. However, the court disagreed with the district court in two respects. First, the court of appeals held that there were genuine issues of fact on whether petitioner had satisfied the elements of the affirmative defense recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S.

742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998). Pet. App. 20a. Second, the court of appeals held that the district court erroneously failed to consider respondent's constructive discharge claim and whether that claim would affect the availability of the affirmative defense. *Ibid.*

Addressing those issues, the court of appeals first held that a plaintiff alleging constructive discharge must show that "(1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign * * * and (2) the employee's reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances." Pet. App. 25a. The court concluded that, in deciding the second issue, "it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning," but that "a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign." *Ibid.* Applying those standards, the court of appeals held that the evidence permitted a reasonable fact-finder to conclude that respondent had been constructively discharged. *Id.* at 26a.

The court of appeals then held that a constructive discharge always constitutes the kind of "tangible employment action" that renders the employer strictly liable and precludes the assertion of the *Ellerth/Faragher* affirmative defense. Pet. App. 28a. The court reasoned that a constructive discharge is "the functional equivalent of an actual termination," and that it has, "in most critical respects, the primary attributes of a tangible employment action, as defined in *Ellerth*



and *Faragher*." *Id.* at 54a. The court explained that "a constructive discharge 'constitutes a significant change in employment status,' by ending the employer-employee relationship," and it "inflicts the same type of 'direct economic harm.'" *Ibid.* (quoting *Ellerth*, 524 U.S. at 761, 762). The court also expressed concern that "removing constructive discharge from the category of tangible employment actions could have the perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment." *Id.* at 55a.

The court of appeals "reject[ed] any rule requiring a plaintiff-employee alleging a constructive discharge to show an official company act in order to prove a tangible employment action." Pet. App. 52a. The court concluded that "when a supervisor creates a hostile work environment so severe that an employee has no alternative but to resign, the official power of the enterprise is brought to bear on the constructive discharge." *Ibid.* The court also concluded that "because a constructive discharge will necessarily involve the termination of an employment relationship, the employer will be on notice and have the opportunity to determine the cause of the separation from employment." *Id.* at 53a.

## SUMMARY OF ARGUMENT

The court of appeals erred in holding that a constructive discharge is always the kind of tangible employment action that triggers strict liability. Unless a constructive discharge is effected through a supervisor's official act, the employer may avoid vicarious liability by establishing the elements of the defense recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 807 (1998).

A. When based on one of Title VII's prohibited characteristics, a "constructive discharge" violates Title VII. Title VII forbids an employer from discharging an employee on a prohibited basis, and an employer may not achieve that result indirectly by creating conditions that force an employee to resign. To establish a constructive discharge, a plaintiff-employee must show that discriminatory conditions were so intolerable that they would have compelled a reasonable employee to resign.

B. In deciding whether conditions would have compelled a reasonable employee to resign, it is relevant whether an employer has exercised reasonable care to prevent and correct discrimination and whether the plaintiff-employee unreasonably failed to take advantage of the preventive and corrective opportunities offered by the employer. Indeed, it may be that if an employer establishes the elements of the *Ellerth/Faragher* affirmative defense, it would preclude the plaintiff from being able to show that a reasonable person would have felt compelled to resign. Conversely, if an employee carries the burden of establishing that she was constructively discharged, including that she did not unreasonably fail to take advantage of the employer's preventive and corrective opportunities, it is not clear how the employer would be able to carry its burden of establishing the *Ellerth/Faragher* affirmative defense. This case, however, proceeds on the assumption that there are cases in which a plaintiff can meet the "compelled to resign" standard even when the employer has established the elements of the *Ellerth/Faragher* defense, and the question is whether, in such cases, the employer may avoid vicarious liability.

C. *Ellerth* provides the framework for resolving that issue. It holds that an employer is strictly liable for a



supervisor's discriminatory conduct and may not assert the *Ellerth/Faragher* affirmative defense when the supervisor takes a "tangible employment action" against a subordinate. 524 U.S. at 760. It further holds that a tangible employment action "requires an official act of the enterprise, a company act." *Id.* at 762.

D. Under *Ellerth*, a constructive discharge triggers strict liability only when it results from a supervisor's official act, such as a humiliating demotion or an extreme cut-in-pay. The court of appeals' view that strict liability is warranted even when a constructive discharge has resulted from a supervisor's unofficial workplace harassment is inconsistent with *Ellerth*'s holding that a tangible employment action *requires* an official act.

*Ellerth* explains why such a showing is a necessary prerequisite for strict liability. First, *Ellerth* implemented the common law principle that an employer is liable for the acts of its agents when the agent was aided by the agency relationship, and the existence of an official act ensures that the supervisor's misconduct was aided by the agency relationship. Absent an official act, the extent to which a supervisor has been aided by the agency relationship is much less clear. Second, because official acts are in most cases documented in official records and subject to higher-level review, they are the acts employers can most easily control. An employer has far less ability to control a supervisor's workplace harassment when it is unaccompanied by an official act, and agency principles therefore do not support a rule of strict liability in such cases. An employee's decision to resign, in the absence of an official act, does nothing to enhance the degree of control over the supervisor's conduct. Accordingly, a constructive

discharge standing alone should not produce a categorical rule of strict liability.

E. Because the court of appeals held that a constructive discharge always triggers strict liability, it did not conduct a thorough analysis of whether respondent's alleged constructive discharge resulted in significant part from a supervisor's official act or acts. The case should therefore be remanded for a determination of that issue.

## ARGUMENT

### AN EMPLOYER IS STRICTLY LIABLE FOR A CONSTRUCTIVE DISCHARGE WHEN THE CONSTRUCTIVE DISCHARGE RESULTS FROM A SUPERVISOR'S OFFICIAL ACT

In *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), the Court established standards for determining when a supervisor's creation of a sexually hostile work environment renders the employer vicariously liable to the victim of that discrimination. The Court devised two different rules of vicarious liability that depend on whether the supervisor's sexual harassment "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808. First, if the supervisor's sexual harassment culminates in a tangible employment action, the employer is strictly liable. *Ibid.* Second, if the supervisor's sexual harassment does not culminate in a tangible employment action, the employer may avoid vicarious liability if it establishes an affirmative defense that consists of two necessary showings: (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff



employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

The courts of appeals have reached three different conclusions on whether a constructive discharge is the kind of "tangible employment action" that triggers strict vicarious liability and precludes the employer from asserting the *Ellerth/Faragher* affirmative defense. The Third Circuit and Eighth Circuits have held that a constructive discharge is *always* a tangible employment action. Pet. App. 28a; *Jaros* v. *Lodgenet Entm't Corp.*, 294 F.3d 960, 966 (8th Cir. 2002). The Second Circuit has held that a constructive discharge is *never* a tangible employment action. *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283, 294-295 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000). And the First and Seventh Circuits have held that a constructive discharge can be a tangible employment action, but only if it is caused by a supervisor's "official" act. *Reed* v. *MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003); *Robinson* v. *Sappington*, 351 F.3d 317, 336 (7th Cir. 2003).

The First and Seventh Circuits have adopted the correct view. A constructive discharge constitutes a "tangible employment action" within the meaning of *Ellerth* and *Faragher* when the constructive discharge results in whole or in significant part from a supervisor's official act or acts. Absent an official supervisory act, the employer may avoid vicarious liability for the constructive discharge and for the pattern of harassment that preceded it by proving the elements of the *Ellerth/Faragher* affirmative defense.

### A. To Establish A Constructive Discharge, An Employee Must Show That A Reasonable Employee Would Have Felt Compelled To Resign

Resolution of the question presented is assisted by an understanding of the statutory basis for a constructive discharge claim and the elements for proving that claim. The starting point for the constructive discharge analysis is the text of Title VII. It forbids an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). That statutory text does not refer to a "constructive discharge." But Title VII's prohibition against a discriminatory "discharge" and its additional prohibition against discrimination in the "terms" and "conditions" of employment are both broad enough to render the employer liable for the creation of discriminatory working conditions that effectively force an employee to resign.

That reading of the statutory text reflects that Congress would not have intended to permit an employer to achieve indirectly what Title VII clearly prohibits the employer from achieving directly. Thus, just as an employer is liable under Title VII when it discharges an employee on the basis of sex, the employer is likewise liable when, because of the individual's sex, the employer creates conditions of employment that effectively force the employee to resign.

This Court has never had occasion to decide whether a plaintiff may assert a constructive discharge claim under Title VII. The courts of appeals, however, have uniformly held that a plaintiff may assert such a claim under Title VII, and they have agreed on a necessary



precondition for proving such a claim: To establish a constructive discharge, an employee must prove that conditions were so intolerable that a reasonable person would have felt compelled to resign.[2] The courts of appeals are divided on whether an employee must make an additional showing that the employer intended to cause the employee to resign.[3] But all courts agree that a plaintiff-employee must show not only that prohibited discrimination has occurred, but also that the discrimination was so intolerable that the employee had no reasonable alternative other than to resign. See note 2, *supra*.

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[2] See *Landrau-Romero* v. *Banco Popular De Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000); *Lopez* v. *S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987); *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3d Cir. 1984); *Matvia* v. *Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 272-273 (4th Cir. 2001); *Young* v. *Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975); *Ford* v. *General Motors Corp.*, 305 F.3d 545, 554 (6th Cir. 2002); *Drake* v. *Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 886 (7th Cir. 1998); *Jaros* v. *Lodgenet Entm't Corp.*, 294 F.3d 960, 965 (8th Cir. 2002); *Bergene* v. *Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1143-1144 (9th Cir. 2001); *Sanchez* v. *Denver Pub. Sch.*, 164 F.3d 527, 534 (10th Cir. 1998); *Fitz* v. *Pugmire Lincoln-Mercury, Inc.*, 348 F.3d 974, 977 (11th Cir. 2003); *Mungin* v. *Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997). The EEOC has adopted that same precondition. EEOC, *No. N-915-050, Policy Guidance on Current Issues of Sexual Harassment* para. 5 Constructive Discharge (Mar. 19, 1990) <http://www.eeoc.gov/policy/docs/currentissues.html>.

[3] See, *e.g.*, *Bourque* v. *Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980) (intent not required); *Whidbee* v. *Garzarelli Food Specialities, Inc.*, 223 F.3d 62, 74 (2d Cir. 2000) (intent required); *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885, 887-888 (3d Cir. 1984) (specific intent not required, but conduct must have foreseeable result of causing employee to resign).

An employee who proves that a hostile work environment is so intolerable as to constitute a constructive discharge secures an important remedial advantage. In general, an employee who resigns in response to an employer's creation of a hostile work environment may only recover damages for the harm that occurred before the employee resigned. Such an employee may not ordinarily recover back pay for the wages lost following the employee's resignation. In contrast, when the work environment is so intolerable as to constitute a constructive discharge, the plaintiff would ordinarily be entitled to recover those post-resignation damages. See 1 Barbara Linderman & Paul Grossman, *Employment Discrimination Law* 838 (3d ed. 1997).

### B. The Employee's Burden of Showing A Constructive Discharge And An Employer's Proof Of The Elements Of The *Ellerth/Faragher* Affirmative Defense Substantially Overlap

1. The courts of appeals have recognized that, independent of their relevance to the issue of vicarious liability, an employer's efforts to prevent and correct harassment and an employee's efforts to alert the employer to a supervisor's harassment are relevant in deciding whether a plaintiff has carried the burden of proving a constructive discharge. For example, the Eighth Circuit has held that "[a]n employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged." *Tidwell* v. *Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (1996). Similarly, the Seventh Circuit has held that an employee's failure to complain about discriminatory working conditions "may show that the employee didn't really consider his working conditions intolerable or may deny the employer a reasonable opportunity



to correct the situation without facing a lawsuit." *Lindale* v. *Tokheim Corp.*, 145 F.3d 953, 955-956 (1998). See EEOC, *No. N-915-050, Policy Guidance on Current Issues of Sexual Harassment* para. 5 Constructive Discharge (Mar. 19, 1990) <http://www.eeoc.gov/policy/docs/currentissues. html>.

Two Eighth Circuit decisions illustrate that, without regard to the issue of vicarious liability, an employer's efforts to prevent and correct harassment and an employee's failure to alert an employer to supervisory harassment can have crucial significance in deciding whether a plaintiff has proven a constructive discharge. In *Jackson* v. *Arkansas Department of Education*, 272 F.3d 1020 (2001), cert. denied, 536 U.S. 908 (2002), the Eighth Circuit held (incorrectly, see pp. 21-26, *infra*) that a constructive discharge is always a tangible employment action and that, once it is shown, an employer is always strictly liable and may not assert the *Ellerth/Faragher* affirmative defense. 272 F.3d at 1026. The court nonetheless went on to hold in that very case that the plaintiff failed to establish that she was constructively discharged because she did not notify her employer until nine months after the harassment began and because she refused to participate in the employer's effort to correct the problem. *Id.* at 1027. In contrast, in *Jaros* v. *Lodgenet Entertainment Corp.*, 294 F.3d 960, 966 (2002), where the plaintiff complained about supervisory harassment and the employer did nothing in response to the complaint, the Eighth Circuit distinguished its prior decision in *Jackson* and sustained a jury's finding of a constructive discharge.

As those cases demonstrate, there is necessarily an overlap between the evidence that is relevant to prove a constructive discharge and the evidence that is relevant to establish the *Ellerth/Faragher* affirmative

defense to vicarious liability. The court of appeals recognized that very point in this case. The court stated:

> [I]t may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs. These are, of course, the same considerations relevant to the affirmative defense in *Ellerth* and *Faragher*.

Pet. App. 58a.

2. There may, however, be more than an evidentiary overlap between the evidence that is relevant to a constructive discharge claim and the evidence that is relevant to the affirmative defense to vicarious liability for actionable harassment. If an employer makes the showings necessary to establish the *Ellerth/Faragher* affirmative defense, it is difficult to understand how an employee would be able to establish a constructive discharge in the first place. Specifically, if an employer has "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," *Ellerth*, 524 U.S. at 765, a plaintiff would not seem to be able to show that discriminatory conditions *compelled* him or her to resign. In that situation, the employer's corrective opportunities would appear to have provided a reasonable alternative to resigning.

Conversely, if an employee can show that the "preventive or corrective opportunities provided by the employer" (*Ellerth*, 524 U.S. at 764) were either flawed



or unavailing, such that they do not preclude a demonstration that the decision to resign, rather than pursue those opportunities, was reasonable, then it is unclear how an employer could carry its burden under the *Ellerth/Faragher* affirmative defense. If the employer cannot prevail when the burden rests on the employee, it is unclear how it will fare better when the burden shifts to the employer to prove the affirmative defense.

This case, however, does not raise the question of the precise relationship between the standard for proving a constructive discharge and the *Ellerth/Faragher* affirmative defense. Moreover, this Court has never addressed a constructive discharge theory of recovery, let alone definitively resolved the plaintiff's burden. If, for example, this Court finally fixed the plaintiff's burden in a constructive discharge case as including a showing that the employee either exhausted or "[r]easonably failed to take advantage of any preventive or corrective opportunities provided by the employer," *Ellerth*, 524 U.S. at 765, it is not clear what further role the affirmative defense could play in constructive discharge cases.

There may, however, be cases in which a plaintiff could satisfy the constructive discharge "compelled to resign" standard even when the employee has "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. at 765. The question presented is whether, in such cases, the employer may assert the *Ellerth/Faragher* affirmative defense to avoid vicarious liability for the constructive discharge and any pattern of harassment that preceded it.

### C. *Ellerth* Guides The Resolution Of The Question Presented

This Court's decision in *Ellerth* provides substantial guidance in resolving that question. Title VII defines an "employer" to include its "agents." 42 U.S.C. 2000e(b). In *Ellerth*, the Court viewed that definition as an express direction "to interpret Title VII based on agency principles." 524 U.S. at 754. Following the Court's earlier decision in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), the *Ellerth* Court concluded that the discussion of agency principles in the Restatement (Second) of Agency (1957) provides a "useful beginning point" for implementing that direction. *Ellerth*, 524 U.S. at 755. The Court focused on the Restatement's specification that an employer is liable for the acts of its agents when the agent "was aided in accomplishing" the act "by the existence of the agency relation." *Id.* at 758 (quoting *Restatement*, *supra*, § 219(2)(d)).[4]

1. The *Ellerth* Court first rejected the view that an agent is aided by the agency relation merely because the existence of the employment relationship ensures proximity and contact with the victim. That view, the Court explained, would make the employer strictly liable for co-worker harassment notwithstanding the uniform understanding of the lower courts and the EEOC that an employer is liable for co-worker harassment only when the employer knew or should have

[4] The Court also noted that other agency principles might be relevant in certain contexts, including the principle that an employer is liable when its negligence is the cause of the agent's act, Restatement, *supra*, § 219(2)(b), and the principle that an employer is liable for the acts of agents committed within the scope of their employment, *id.* § 219(1). See 524 U.S. at 755-759. Neither of those principles is at issue here.



known about the harassment and failed to take corrective action. 524 U.S. at 760-761.

2. The Court then identified "a class of cases where, beyond question, more than the mere existence of the employment relationship aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate." *Ellerth*, 524 U.S. at 760. The Court stated that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. The Court explained that "[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-762.

The Court expressly contrasted tangible employment decisions from injuries that could be equally inflicted by a co-worker. For example, "[a] co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries," but "one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another." *Ellerth*, 524 U.S. at 762. In most cases, the Court continued, a tangible employment action "inflicts direct economic harm," and "[a]s a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury." *Ibid.*

The Court further elucidated that a tangible employment action "requires an official act of the enterprise, a company act." *Ellerth*, 524 U.S. at 762. Thus, "in most cases" a tangible employment decision "is documented in official company records, and may be subject to review by higher level supervisors," and "[t]he supervisor

often must obtain the imprimatur of the enterprise and use its internal processes." *Ibid.* For those reasons, the Court held, "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Ibid.*

3. The Court concluded that, when supervisory harassment does not culminate in a tangible employment action, it is less clear whether the harassment was aided by the agency relation. *Ellerth*, 524 U.S. at 763. "On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Ibid.* "On the other hand, there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status makes little difference." *Ibid.*

Because the aided-by-the-agency-relation principle does not furnish a clear answer to the question whether an employer is vicariously liable for supervisory acts that do not involve a tangible employment action, the Court turned to two other Title VII considerations to resolve that issue. First, the Court concluded that, if the standard of employer liability were made to depend in part on an employer's maintenance of effective anti-harassment policies, it would provide an incentive for the creation of such programs and "would effect Congress' intention to promote conciliation rather than litigation in the Title VII context." *Ellerth*, 524 U.S. at 764. Second, "[t]o the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose." *Ibid.* Accordingly, the Court held that when a supervisor's harassment does not culminate in a tangible employment action, an employer may defeat vicarious liability by establishing as an affirmative defense "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765.



### D. Under *Ellerth*, A Constructive Discharge Triggers Strict Liability When It Results From A Supervisor's Official Act

A constructive discharge can be effected through the actions of co-workers, the unofficial acts of supervisors, or the official acts of supervisors. Under the *Ellerth* analysis, only a constructive discharge effected in whole or in significant part through a supervisor's official act is the kind of "tangible employment action" that triggers strict liability and precludes the assertion of the *Ellerth/Faragher* affirmative defense.

1. The court of appeals' holding in this case that a constructive discharge is *always* a "tangible employment action" as that term is used in *Ellerth* suffers from at least two serious flaws. First, taken to its logical conclusion, it would mean that an employer would be strictly liable for a constructive discharge that results entirely from co-worker harassment. That result is impossible to reconcile with *Ellerth*'s holding that the aided-by-the-agency-relation principle cannot be stretched to encompass the activities of co-workers. 524 U.S. at 760.

More fundamentally, under *Ellerth*, a tangible employment action is an action that "requires an official act of the enterprise, a company act," 524 U.S. at 762,

and when a supervisor (and, a fortiori, a co-worker) effects a constructive discharge through ordinary workplace harassment, that requirement is not satisfied. For example, in this case, one of respondent's supervisors engaged in a repeated daily practice of grabbing his groin area and yelling, in respondent's presence, "suck it." See Pet. App. 8a. Even if a jury found that conduct sufficiently severe and pervasive to create a hostile work environment, and to cause a reasonable person to feel compelled to resign, it would not constitute an "official act of the enterprise" under *Ellerth*. 524 U.S. at 762. It is not conduct that depends on a grant of authority from the employer to the supervisor. It is not conduct that "only a supervisor" could have committed; a co-worker could have engaged in precisely the same objectionable conduct. *Ibid.* The practice would not "in most cases" be "documented in official company records" or be "subject to review by higher level supervisors." *Ibid.* And before undertaking it, a supervisor would not often "obtain the imprimatur of the enterprise" or "use its internal processes." *Ibid.* Under the Third Circuit's theory that a constructive discharge is always a tangible employment action, however, that conduct, when committed by a supervisor, could lead to strict liability and preclude the assertion of the affirmative defense.

The court of appeals "reject[ed] any rule requiring a plaintiff-employee alleging a constructive discharge to show an official company act in order to prove a tangible employment action." Pet. App. 52a. In the court's view, it is enough that a constructive discharge bears other indicia of a tangible employment action, such as working a significant change in employment status and inflicting economic injury. *Id.* at 54a. But under *Ellerth*, the existence of an official act is not something



that can be dispensed with as long as other indicia of a tangible employment action are present. Under *Ellerth*, a tangible employment action "*requires* an official act of the enterprise." 524 U.S. at 762 (emphasis added).

The considerations that underlie *Ellerth*'s distinction between tangible employment actions and other supervisory conduct demonstrate why an official act should remain a necessary prerequisite to strict liability. The existence of an official act, such as a demotion or a reduction in compensation, establishes "beyond question" that the supervisor has been aided by the agency relation in victimizing the employee. 524 U.S. at 760. Absent an official act, the extent to which the supervisor has been aided by the agency relation is less certain. *Id.* at 763. That uncertainty justifies permitting the employer to establish through the *Ellerth/Faragher* affirmative defense that it should not be held vicariously liable.

Moreover, because official acts "in most cases" are "documented in official company records, and may be subject to review by higher level supervisors," *Ellerth*, 524 U.S. at 762, they are the acts over which employers can exercise the most control. The employer's ability to control and prevent unlawful official action provides a crucial justification for holding an employer strictly liable for a supervisor's improper conduct even if the employer could otherwise show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765. When there is no official act, an employer's ability to control a supervisor's conduct and prevent a supervi-

sor's misconduct diminishes. In that event, failing to structure the rules of vicarious liability so as to provide an incentive for an employer to exercise reasonable care in preventing and correcting discrimination and for an employee to report discriminatory treatment cannot be squared with Title VII's goal of encouraging practices that will lead to the prevention and correction of discriminatory conduct without the need for litigation. *Id.* at 764.

2. The court of appeals' other justifications for holding that a constructive discharge always triggers strict liability are unpersuasive. The court's conclusion that a constructive discharge is always a tangible employment action because it is "the functional equivalent of an actual termination," see Pet. App. 54a, rests on an incorrect premise. A constructive discharge is functionally the same as an actual termination in some respects, but it is functionally different in ways that are directly relevant to the appropriateness of making the *Ellerth/Faragher* affirmative defense available. Both involve an end to the employment relationship. But in a constructive discharge, the employee ultimately decides that he or she has no alternative but to resign, whereas in an actual termination, the employer makes the ultimate decision to end the relationship. And, while an actual termination is *always* effected through an official act of the company, a constructive discharge may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. A constructive discharge involves both an employee's decision to leave and precipitating conduct. The former involves no official action, and the latter may or may not involve official action. Under *Ellerth*, those differences are critical for purposes of determining the correct vicarious liability principle.



The court of appeals' observation that the employee's resignation provides notice to the employer of the employee's departure does not alter the vicarious liability analysis. See Pet. App. 53a. Strict liability is triggered by an official act of the enterprise, not an official act of the employee. Moreover, unless the resignation has been precipitated by an adverse official act, or the employer has otherwise been alerted to the circumstances leading to the resignation, an employer would have no reason to view the resignation as anything other than one of the innumerable voluntary resignations that occur daily in this nation's workforce. The employer generally will have no reason to view a resignation as a constructive discharge until it is so characterized in a lawsuit months or years later. Agency principles provide no justification for requiring employers to devote the resources necessary to determine the circumstances underlying each and every voluntary resignation, particularly when the number of voluntary resignations that amount to constructive discharges is likely to be exceedingly small.

Finally, the Third Circuit's rule cannot be justified on the theory that an additional deterrent is needed to prevent employers from permitting hostile work environments to ripen into constructive discharges. See Pet. App. 55a. An employer that deliberately delays in correcting a hostile work environment would lose its ability to assert the *Ellerth/Faragher* affirmative defense, since that defense requires the employer to show that it "exercised reasonable care to prevent and correct *promptly* any sexually harassing behavior." *Ellerth*, 524 U.S. at 765 (emphasis added); *Faragher*, 524 U.S. at 807 (same). Such an employer would also risk greatly compounding the amount of damages for psychological injury it would owe to the employee. And

that kind of bad faith could also expose the employer to an award of punitive damages. See *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 545-546 (1999). Those potential consequences provide adequate incentives for an employer to eliminate a hostile work environment before it ripens into a constructive discharge. The court of appeals therefore erred in holding that a constructive discharge always triggers strict liability.

3. That does not mean that a constructive discharge is never a tangible employment action, as the Second Circuit held in *Caridad* v. *Metro-North Commuter Railroad*, 191 F.3d 283, 294-295 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000). Under *Ellerth*, a constructive discharge is a tangible employment action when it is effected through a supervisor's official act. For example, if a supervisor informed an employee performing important professional duties that he had demoted the professional to the position of janitor, and that caused a reasonable employee to resign, the constructive discharge would involve a tangible employment action under *Ellerth*. A demotion is one of the official acts specified in *Ellerth*. 524 U.S. at 765. Accordingly, under *Ellerth*, if the supervisor engaged in harassment that culminated in a demotion of the employee on a prohibited ground, the employer would be strictly liable for the difference in pay between the professional position and the janitorial position as well as any psychological harm caused by the demotion and the harassment that preceded it.

If essentially the same official act results in a constructive discharge, agency principles similarly justify holding the employer strictly liable for the resulting loss of wages. In such a case, the supervisor's ability to effect a constructive discharge is, "beyond question," aided by the supervisor's agency relation. *Ellerth*, 524



U.S. at 760. Absent the employer's delegation of authority to the supervisor to demote employees, the constructive discharge could not have occurred. And because of the employer's ability to oversee demotion decisions, it may take steps to prevent a supervisor from demoting an employee where that action would foreseeably make a reasonable employee feel compelled to resign.

4. The First and Seventh Circuit decisions provide good examples of how the "official act" standard operates in practice. In *Reed*, the plaintiff claimed a constructive discharge based on a supervisor's repeated sexual comments to her and an incident in which the supervisor sexually assaulted her. The First Circuit held that those acts did not preclude the employer from asserting the *Ellerth/Faragher* affirmative defense, explaining that the supervisor's conduct was "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed." *Reed*, 333 F.3d at 33.

In contrast, in *Robinson*, after an employee complained that the judge she was working for had subjected her to sexual harassment, the presiding judge transferred her to another judge, told her that the transfer would make her life miserable for six months, and suggested that she resign. After resigning, the employee filed suit claiming constructive discharge, and plaintiff's employer asserted the *Ellerth/Faragher* affirmative defense. The Seventh Circuit held that since the presiding judge's action in transferring the plaintiff was an official act, the employer could not assert that defense to the employee's constructive discharge claim. *Robinson*, 351 F.3d at 337.

### E. The Case Should Be Reversed And Remanded For A Determination Whether Respondent's Supervisors Committed An Official Act

Because the court of appeals in this case held that a constructive discharge is always a tangible employment action, it did not undertake a thorough analysis of whether any of the actions that allegedly precipitated respondent's constructive discharge was an official act. Much of the conduct that allegedly caused respondent to resign was unofficial. For example, Sergeant Easton's repeated statements about "people having sex with animals," Corporal Baker's inappropriate gestures and statements, and Corporal Prendergast's intimidating table-pounding were "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed." *Reed*, 333 F.3d at 33.

On the other hand, the activities of respondent's supervisors in allegedly setting her up on a false charge of theft and engineering her arrest in order to force her to resign pose a more difficult question. The parties have not focused on evidence that would be relevant in resolving that issue, such as whether those activities depended on a grant of authority to supervise respondent in her employment or whether they could have been undertaken by any law enforcement officer, and whether that kind of activity is likely to be documented and subject to review by higher authority. The judgment of the court of appeals should therefore be reversed and the case should be remanded for a determination whether respondent's alleged constructive discharge resulted in significant part from an official act or acts.



## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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